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No. 02-1255

In the

Supreme Court of the United States

F/V JEANINE KATHLEEN, Official No. 972086, Her Tackle, Furniture and Apparel, *in rem*; F/V ROSE LEE, Official No. 942678, Her Tackle, Furniture and Apparel, *in rem*, F/V TALIA, Official No. 973296, Her Tackle, Furniture and Apparel, *in rem*, Defendants,
and
ROGER INGMAN; JODY INGMAN; ROSE LEE LLC; DENNIS H. EAMES; ANDREA EAMES,

Petitioners,

v.

VENTURA PACKERS, INC., a California Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

Where there are triable issues of material fact concerning the existence of federal subject matter jurisdiction based on the provision of necessaries under the Maritime Lien Act, 46 U.S.C. §31342, is summary dismissal by the District Court proper under Federal Rules of Civil Procedure, Rule 56?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondent makes the following corporate disclosure statement:

Respondent Ventura Packers, Inc., is a privately held California corporation. Ventura Packers has no parent companies nor wholly owned subsidiaries.

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COUNTER-STATEMENT OF CASE

Factual Background

Ventura Packers is a California corporation doing business in Ventura Harbor, California [ER 1-2; DN 1].[1] Independent Fisherman's Cooperative (IFC) was formed under the Fisherman's Collective Marketing Act, 15 United States Code §521 [ER 193-194; DN 21 and 51, Ex. G]. Petitioners F/V Jeanine Kathleen, Official No. 972086, F/V Rose Lee, Official No. 942678, and F/V Talia, Official No. 973296 and vessel owners/petitioners Dennis H. Eames, Roger L. and Jody K. Ingman, Richard Eide and Rose Lee, LLC were members of IFC during the 1996-1997 squid fishing season [ER 36, 44, 51, 90, 95, 100, 194-195, 326, 343, 494-497, 1588; DN 6-8, 15-17, 21, 26, 28, 51, 87].

Squid decomposes rapidly. If it is not brought into port, processed, and frozen within 24 hours, its fitness for human consumption diminishes [ER 194-196, 480-481, 532, 539, 779-780; DN 21 and 51, Ex. E, J and L]. Priority dock access and speed in unloading and processing is extremely important [ER 504, 522, 778-779; DN 51 and 55]. For these reasons, petitioners authorized Greg Kirsch to act as their local agent in contracting for unloading, processing, and marketing of squid from IFC vessels by Ventura Packers so petitioners could spend more time catching fish and making money [ER 194-195, 494-497, 502, 517-518, 524, 540-541; DN 21 and 51, Ex. G, H, J and L].

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[1] "ER" stands for Excerpts of Record, "DN" for Docket Number, and "Ex." for Exhibit.

Roger Ingman, master of the Jeanine Kathleen, Mitch and Richard Eide, masters of the Rose Lee, and Joseph Donahue, master of the Talia, authorized unloading and processing of their squid by calling ahead to Ventura Packers on their way into port [ER 198, 494, 502, 540-541, 782; DN 21, 55 and 51, Ex. G, H, and L]. Ventura Packers granted priority dock access, unloaded, packed, iced and shipped squid from petitioners' vessels to the processing facility [ER 1-8, 196-198, 777-780; DN 1, 21 and 55].

Petitioners were to pay Ventura Packers $80.00 per ton of squid unloaded from each vessel for these services [ER 4, 659, 777-780; DN 1, 53, and 55] – $50 per ton for ice and stevedoring, $10 per ton for priority dock access, and $20 per ton for government entity fees, transportation, and cold storage (*Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. Cal. 2002)). Each time a vessel was unloaded, a separate "fish ticket" was filled out by Ventura Packers, many of which bear the actual signature of the vessel owners or masters like Ingman, Eide, and Donahue [ER 198, 441, 658, 789-903; DN 21, 53, and 56, Ex. A-C].

Ventura Packers provided services to petitioners on 188 different occasions [ER 198; DN 21]. As a result, petitioners owed Ventura Packers $93,174.84 for unloading the Jeanine Kathleen, $121,617.92 for unloading the Rose Lee, and $82,891.08 for unloading the Talia. Of those amounts, $22,514.33 is still owed by the Jeanine Kathleen; $105,118.81 is still owed by the Rose Lee; and $42,705.06 is still owed by the Talia [ER 660, 664-666, 763; DN 53, Exhibit A; DN 54].

Procedural History

Ventura Packers complained in rem for payment for necessaries furnished to petitioners pursuant to 46 U.S.C. §31342 and Federal Rules of Civil Procedure, Rules 9(h) and Supplemental Rules C(a), C(2), E(2)(a), and seized the vessels [ER 1-9, 10-29; DN 1, 2, 3, and 4]. Petitioners Roger and Jody Ingman, Richard Eide, and Dennis Eames, submitted undertakings to have their vessels released and intervened [ER 36-55, 56-59; DN 6, 7, 8, 12].

Petitioners moved to dismiss the complaint for lack of subject matter jurisdiction, which the District Court initially denied [ER 60-160, 289-415, 416-423; DN 13-18, 24-30, 35]. Ventura Packers moved for summary judgment on the grounds that the defendant vessels could not avoid liability for necessaries furnished to each vessel [ER 435-991, 1502-1552; DN 49-58, 79-80, 83]. Petitioners filed a counter motion for summary judgment asserting lack of subject matter jurisdiction and advocating dismissal [ER 992-1100, 1370-1501; DN 61-64, 69]. The District Court granted petitioners' motion, and entered a judgment of dismissal in favor of petitioners [ER 1553-1573; DN 87-89].

Ventura Packers appealed [ER 1581-1625; DN 91-94]. The Ninth Circuit reversed and remanded the case to the District Court because there were triable issues of material fact concerning the provision of necessaries to vessels upon the order of the owner or authorized representative as described under the Maritime Lien Act, 46 U.S.C. §31342 (*Ventura Packers, Inc., supra*, 305 F.3d 913, 924).

I.

THE WRIT SHOULD BE DENIED BECAUSE THE STANDARDS FOR GRANTING CERTIORARI HAVE NOT BEEN MET.

This case does not meet the standards set out in Rule 10 of the United States Supreme Court Rules. There are no compelling reasons for review, nor are there any important federal questions involving conflicts with decisions of this Court, the United States Courts of Appeals, or the decisions of another state court of last resort.

A. There Are No Compelling Reasons for Review Because (1) the Ninth Circuit Has Not Made New Law, (2) and the Matter Is Not Procedurally Ripe.

There are two basis for admiralty jurisdiction here. The first is a maritime contract (*Simon v. Intercontinental Transport*, 882 F.2d 1435, 1440, 144-1442 (9th Cir. 1989)). The second is a maritime lien for "necessaries" under the Maritime Lien Act, 46 U.S.C. §31342.

Petitioners argue throughout their brief that the Ninth Circuit has made new law because it did not require the existence of a maritime contract as a prerequisite to remanding the matter for trial on the supply of necessaries to enforce a maritime lien. To support this argument, petitioners state that both the District Court and the Ninth Circuit found that there was no contract [Petition, pp. 1, 6]. This statement is untrue.

Contrary to petitioners' assertions, both the District Court and the Ninth Circuit found that there was

a contract in this case. However, the courts declined to exercise subject matter jurisdiction under that contract because it intertwined both maritime and non-maritime elements [See ER 1566-1567; DN 87]. "[T]he reality of the situation is that the contract upon which Ventura Packer's maritime lien claim is based involves both maritime and non-maritime elements" (*Ventura Packers, Inc., supra*, 305 F.3d at 916, 917).

Where the contract contains both maritime and non-maritime elements, the majority of which are maritime in nature, the court has discretion to exercise jurisdiction over the maritime portions of the contract (*Atlantic Mutual Insurance Company v. Balfour MacLane Intn'l Ltd., et al.*, 968 F.2d 196, 199 (2nd Cir. 1992); *Simon, supra*, 882 F.2d 1435 at 1442; *Marubeni-Iida (America) v. Nippon Yusen Kaisha*, 207 F.Supp 418, 420 (S.D. N.Y. 1962). The District Court declined jurisdiction based on maritime contract. It did not analyze jurisdiction based upon the provision of necessaries under the Maritime Lien Act.

1. The Ninth Circuit Did Not Create New Law.

Petitioners argue that the Ninth Circuit created a new basis for admiralty jurisdiction when there is no maritime contract. However, admiralty jurisdiction may be based upon either (1) a maritime lien, ***or*** (2) a maritime contract (*Farwest Steel Corp. v. Barge Sea Span 241*, 769 F.2d 620, 621 (9th Cir. 1985), citing *Alyeska Pipeline Service Co. v. Vessel Bay Ridge*, 703 F.2d 381, 384 (9th Cir. 1983), cert. dismissed, 467 U.S. 1247, 104 S.Ct. 3526, 82 L.Ed. 2d 852 (1984) and *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967, 970 (9th Cir. 1983)).

The Ninth Circuit noted that while the contract in question could be a basis for admiralty jurisdiction, "Congress provided an independent statutory basis for admiralty jurisdiction by enacting 46 U.S.C. §31342" (*Ventura Packers, Inc., supra*, 305 F.3d at 917). Thus, the decision of the Ninth Circuit here merely clarifies the point it made in *Farwest Steel*, that there are alternative basis for federal subject matter jurisdiction, and a necessaries lien brought under the Maritime Lien Act is one such basis (*Ventura Packers, Inc., supra*, 305 F.3d at 917, 922-924).

46 U.S.C. §31342, which is part of the Maritime Lien Act, provides for a civil action to enforce a maritime lien against a vessel, by a creditor who has provided "necessaries" to that vessel at the direction of the owner or master (46 U.S.C. §31342). A maritime lien is a special property right in a vessel which secures creditors who provide supplies to keep a ship going (*Silver Start Enterprises v. Saramacca*, 82 F.3d 666, 668 (5th Cir. 1996)). The concept developed as a necessary incident of the operation of vessels. Indeed, the existence of a maritime lien is synonymous with admiralty jurisdiction (Gilmore and Black, *The Law of Admiralty*, (2nd Ed. 1975), § 9-19 at 672; *The Rock Island Bridge*, 73 U.S. (6 Wall) 213, 215 (1867); *The Resolute*, 168 U.S. 437, 440 (1897)).

The lien statute, 46 U.S.C. §31342, provides in pertinent part:

> "(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner –
> (1) has a maritime lien on the vessel;

> (2) may bring a civil action in rem to enforce the lien; and
> (3) is not required to allege or prove in the action that credit was given to the vessel."

For a lien under 46 U.S.C. §31342, all that is required is that a creditor provide "necessaries" to a vessel at the direction of the owner or master of the vessel (2 *Benedict on Admiralty* (7th Ed. 1996) §35 at 3-22; 46 U.S.C. §§31341-31342). The term "necessaries" is liberally construed to include anything that facilitates or enables a vessel to perform its mission or occupation, anything reasonably needed for the venture in which the ship is engaged (*Foss Launch and Tug Company v. Char Ching Shipping USA Limited*, 808 F.2d 697, 699 (9th Cir. 1987); *Equilease Corp. v. M/V SAMPSON*, 793 F.2d 598, 603 (5th Cir. 1986); *Farwest Steel, supra*, 769 F.2d at 623; *Payne v. S.S. Tropic Breeze*, 423 F.2d 236, 240 (1st Cir. 1970)).

"Necessaries" may include: money, labor, material, skill, or personal services; dockage and stevedoring; the unloading, weighing, icing, processing, packaging, and immediate transport of fish (*Trinidad Foundry and Fabricating, Ltd. v. M/V K.A.S. Camilla*, 966 F.2d 613, 615-616 (11th Cir. 1992); *Inbesa America, Inc. v. M/V Anglia*, 134 F.3d 1035, 1037 (11th Cir. 1998); *Universal Shipping, Inc. v. The Panamanian Flag Barge*, 563 F.2d 483, 484 (9th Cir. 1976); *South Carolina State Ports Authority v. M/V Tyson Lykes*, 837 F.Supp 1357, 1366-1367, affirmed 67 F.3d 59 (D.S.C. 1993); *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 456 (1947); *Cory Bros. & Co. v. United States*, 51 F.2d 1010, 1011 (2d Cir. 1931); *Domenico v. Alaska Packers' Ass'n*, 112 F. 554, 556 (N.D. Cal. 1901); *Hinkens Steamship Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411 (9th Cir. 1974)). Necessaries may also include the cost of

transporting supplies; the weighing, inspecting, fumigation and shipping of cargo; and printing materials (*The Rupert City*, 213 F. 263 (W.D. Wash 1914); *The Susquehanna*, 3 F.2d 1014, 1923 A.M.C. 643 (D. Mass 1923); *Colonial Press of Miami, Inc. v. The Allen's Cay*, 277 F.2d 540, 1959 A.M.C. 527 (5th Cir. 1960)). Necessaries may even include food catering services (*General Elec. Credit v. Drill Ship*, 668 F.2d 811 (5th Cir. 1982)).

On summary judgment, there were factual disputes which concerned: (1) whether all of the services provided by Ventura Packers qualified as "necessaries;" and (2) if so, whether all services were ordered or accepted by the vessel's authorized agent, owner or master. Because these factual questions had not yet been resolved, the Ninth Circuit remanded this matter to the District Court for further trial on the factual disputes (*Ventura Packers, Inc., supra*, 305 F.3d at 924).

2. Because There Remain Facts in Dispute Which Have Not Been Tried, This Matter Is Not Ripe For Review.

The procedural status of this case does not warrant review. Here, Ventura Packers asserted federal subject matter jurisdiction on two grounds: (1) the existence of a lien *in rem* based upon breach of a maritime contract; and alternatively, (2) the existence of a lien *in rem* based upon the provision of "necessaries" under the Maritime Lien Act, 46 U.S.C. §31342.

Petitioners moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the contract in question was not maritime in nature. The District Court summarily dismissed Ventura Packers' *in*

rem complaint for lack of subject matter jurisdiction because the contract in question involved both maritime and non-maritime activities, which were not severable. Therefore, the District Court declined to assert admiralty jurisdiction based on maritime contract.

The Ninth Circuit agreed with the District Court's finding that the contract in question covered both maritime and non-maritime activities. However, the Ninth Circuit held that the District Court's subject matter jurisdiction analysis was flawed because it failed to look at subject matter jurisdiction under the Maritime Lien Act, 46 U.S.C. §31342 (*Ventura Packers, Inc., supra*, 305 F.3d at 917, 922).

The Ninth Circuit found there were triable issues of material fact concerning subject matter jurisdiction and the provision of necessaries to vessels upon the order of the owner or authorized representative as described under the Maritime Lien Act, 46 U.S.C. §31342 (*Ventura Packers, Inc., supra*, 305 F.3d 922-924). Where jurisdictional facts, essential to the elements underlying the federal claim, are intertwined and the same statute provides the basis for both relief and jurisdiction, the court should not resolve disputed facts, because jurisdictional fact finding deprives the litigants of the protections otherwise afforded by Federal Rules of Civil Procedure, Rule 56 (*Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 910 (9th Cir. 1997); *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139, 150 (9th Cir. 1983); *Mortensen v. First Fed'l Sav. & Loan Ass'n.*, 549 F.2d 844, 890 (3d Cir. 1977)). Because the Maritime Lien Act "inextricably intertwines the questions of subject matter jurisdiction and Ventura Packers' substantive claim for relief," the Ninth Circuit remanded this matter to the District Court for trial on disputed factual questions which involved both

jurisdiction and the merits of the lien (*Ventura Packers, Inc., supra*, 305 F.3d 922-924).

There has yet to be a final judgment after a trial of these disputed factual questions. Therefore, this case simply is not ripe for review.

B. The Ninth Circuit Decision Does Not Conflict With Decisions by this Court or Any Other Court.

Petitioners' conflicting decisions argument is founded upon petitioners' misunderstanding of the alternative grounds for subject matter jurisdiction expressed in Ventura Packers' pleadings, and upon petitioners' misinterpretation of the Ninth Circuit's decision. Nevertheless, contrary to petitioners' assertions [Petition, pp. 6-14], the Ninth Circuit decision does not conflict with decisions by this Court or other courts within the United States.

1. United States Supreme Court Decisions.

Petitioners allege that the decision of the Ninth Circuit conflicts with *Exxon Corporation v. Central Gulf Lines, Inc.*, 500 U.S. 603, 111 S.Ct. 2071 (1991) [Petition, pp. 6-7]. Petitioners argue that *Exxon* requires the existence of a maritime contract in order for there to be federal subject matter jurisdiction under the Maritime Lien Act [Petition, pp. 6-7].

To support their argument, petitioners quote *Exxon, supra*, as holding "that 'a prerequisite to the existence of a maritime lien for breach of contract is that the subject matter of the contract must fall within admiralty jurisdiction'" [Petition, pp. 7-8, citing *Exxon*

Corporation v. Central Gulf Lines, Inc., 707 F. Supp 155, 158 (S.D.N.Y. 1989)]. However, this Court did not require admiralty jurisdiction to exist under maritime contract in order for subject matter jurisdiction to exist under the Maritime Lien Act. This Court did not even address the issue.

> "We express no view on whether Exxon is entitled to a maritime lien under the Federal Maritime Lien Act. That issue is not before us, and we leave it to be decided on remand" (*Exxon, supra,* 500 U.S. 606, 613).

Therefore, the decision of the Ninth Circuit to remand this case to the District Court for trial on disputed facts concerning subject matter jurisdiction and the merits of a valid lien under the Maritime Lien Act, does not conflict with the *Exxon*.

2. United States Court of Appeals Decisions.

Petitioners argue that the Ninth Circuit's decision conflicts with decisions of the First, Second, Third, Eighth, Tenth and Eleventh Circuits, citing *The WALTER ADAMS*, 253 F. 20, 24 (1st Cir. 1918); *Murray v. Schwartz*, 175 F.2d 72, 73 (2d Cir. 1949); *Bermuda Exp., N.V. v. M/V LISA (ex Laurie U)*, 872 F.2d 554, 563 (3d Cir. 1989); *Nilo Barge Line, Inc. v. M/V BAYOU Dularge*, 584 F.2d 841, 842 1980 A.M.C. 750 (8th Cir.1978); *Chase Manhattan Financial Services, Inc. v. McMillian*, 896 F.2d 452 (10th Cir. 1990); *E.S. Binnings, Inc. v. M/V SAUDI RIYADH*, 815 F.2d 660 (11th Cir. 1987); *Inbesa America, Inc. v. M/V ANGLIA*, 134 F.3d 1035, 1036, 1038 (11th Cir. 1998); and *BOAT LA*

SAMBRA v. Lewis, 321 F.2d 29 (9th Cir 1963)[Petition, p. 7-12].

First, all these cases are actions in which a claimant asserted a maritime lien based upon a maritime contract. These authorities do not involve claimants who asserted a maritime lien based upon the provision of necessaries to an owner or master of a vessel, as articulated in the Maritime Lien Act. Therefore, these authorities do not speak to the issue addressed by the Ninth Circuit concerning Ventura Packers's assertion of a lien under the Maritime Lien Act.

Second, *Exxon* overruled *Minturn v. Maynard*, 58 U.S. 477, 15 L.Ed 235 (1855) and the requirement of a non-agency maritime contract that was wholly maritime in nature (*Id.*, at 610-612). To the extent that *The WALTER ADAMS*, *Murray v. Schwartz*, *Bermuda Exp.*, *Nilo Barge Line*, *Chase Manhattan Financial Services, Inc.*, *E.S. Binnings*, and *BOAT LA SAMBRA* predate *Exxon* and rely on *Minturn* and its wholly maritime in nature, non-agency contract reasoning, they are no longer good authority (*Id.*, at 608, fn.4, 612). This is because *Exxon*, *supra*, 500 U.S. 603, 606 fn. 2, 612-613, found admiralty jurisdiction in favor of Exxon under the assertion of a maritime lien based on both agency and non-agency maritime contracts for the provision of fuel, and in instances where it provided fuel in a manner outside of a contract.

Further, the court in *E.S. Binnings*, rejected the argument that the Maritime Lien Act provided jurisdiction over ***non-maritime concerns***. However, like this Court in *Exxon*, the *E.S. Binnings* court expressed no opinion on jurisdiction over a suit covering ***traditional maritime concerns*** (*E.S. Binnings*, *supra*, 815 F.2d at 6[illegible]).

Third, even though many of the authorities cited by petitioners were decided on the basis of maritime contract, these authorities recognize a distinction between a lien based on maritime contract and a lien based upon the provision of maritime necessities (*The WALTER ADAMS*, *supra*, 253 F. at 23; *Bermuda Exp., N.V.*, *supra*, 872 F.2d at 563; *Inbesa*, *supra*, 134 F.3d at 1036-1037 fn.2, 1038). For example, even though *Inbesa* did not make a necessities lien claim, that court reasoned that "federal admiralty jurisdiction is coterminous with the right of providers of maritime services to maritime liens" (*Inbesa*, *supra*, 134 F.3d at 1036-1037 fn.2, 1038). This statement shows that the *Inbesa* court recognized that a claimant can have not only a lien action based on contract, but also a concurrent civil action for a maritime lien based upon the provision of necessaries, as in this case. Thus, the reasoning of the *Inbesa* court is line with the reasoning of the Ninth Circuit:

> "If Ventura Packers had asserted admiralty jurisdiction based on breach of contract, *The Resolute* would apply. In that case, Ventura Packers would have had to prove the arrest of the Ships and existence of a maritime contract. Ventura Packers, however, did not rest its assertion of admiralty jurisdiction entirely on the common law. Ventura Packers brought suit in admiralty as provided by Congress in the Maritime Lien Act"
> (*Ventura Packers*, *supra*, 305 F.3d at 920-921).

3. Ninth Circuit Decisions.

Petitioners argue that the Ninth Circuit decision conflicts with *BOAT LA SAMBRA*, *supra*, 321 F.2d 29 [Petition, p. 14]. Unfortunately, like the preceding authority cited by petitioners, *BOAT LA SAMBRA* was brought as a breach of ship-building contract lien action, not as a necessaries lien. Therefore, it dos not apply to the Ninth Circuit's decision in this case.

The Ninth Circuit has previously assumed jurisdiction over maritime liens cases without requiring a contract (*The Port of Portland v. The M/V Paralla*, 892 F.2d 825, 827-828 (9th Cir. 1989) [jurisdiction assumed under 28 U.S.C. §1333]; *Marine Fuel Supply & Towing, Inc. v. The M/V Ken Lucky*, 869 F.2d 473, 476-477 (9th Cir, 1988) [supply of fuel to vessel without contract]; *Albany Insurance Company v. M.V. Istrian Express*, 61 F.3d 709, 710 (9th Cir. 1989)). Further, the Ninth Circuit has held that "[t]he district court had admiralty jurisdiction if it was adjudicating either a maritime lien (citation omitted), or a contact . . . (citation omitted)" (*Farwest Steel Corp.*, *supra*, 769 F.2d at 621).

Lastly, the Ninth Circuit was very conscious of past decisions concerning maritime liens and the Maritime Lien Act. It carefully explained the evolution of the Act and resolved any perceived conflicts (*Ventura Packers*, *supra*, 305 F.3d at 920-922).

Petitioners have continually misunderstood the different basis for federal subject jurisdiction asserted by Ventura Packers. This misunderstanding has colored petitioners' interpretation of the Ninth Circuit's decision, along with other decisions made by this Court and the various Courts of Appeals. Petitioners'

misinterpretation of non-applicable case law is not grounds for granting their writ.

CONCLUSION

Because triable questions of material fact remain which preclude summary resolution of jurisdiction issues, respondent Ventura Packers requests that the petition for writ of certiorari be denied.

Should this Court be so inclined, Ventura Packers requests an award of costs.

Respectfully submitted,

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